

IN THE HIGH COURT OF LESOTHO

In the Application of :

DORBYL FINANCE (PTY) LTD

Applicant

V

J.M. LETHOBA

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 12th day of February, 1990.

On 8th December 1988 the applicant obtained an interim Court Order before Molai J. On the following day the applicant sought to be issued from the office of the Registrar the Court Order appearing on pages 31 and 32 of the record.

The 3rd August 1989 was the extended return date of the Rule Nisi which had been granted a long time previously.

I heard the matter on the return date.

The case for the applicant is that he sold a bus to the respondent. The respondent is in arrears. The applicant's counsel as indeed the applicant's papers set out that the respondent says that he had to pay for repairs on the vehicle hence his failure to pay the price fixed for the bus. The respondent is of the view that because of the expenses he incurred in repairing the

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vehicle he was not obliged to effect payments agreed upon between him and the applicant.

In an answering affidavit one Molati who is not the respondent avers that he is entitled to answer the applicant's papers because he Molati is the one using the vehicle.

The applicant's counsel indicated that he was not taking the point that Molati has no locus standi but rather is impugning the respondent's attitude.

Annexure B attached to the applicant's papers shows in clause 6 relied on by the applicant at page 7 of its affidavit that

"Ownership in the goods shall not pass to the Buyer until receipt by the Seller of all amounts payable by the Buyer under this agreement in respect of such goods."

See paragraph 4 of the applicant's affidavit.

The applicant also relies on the breach clause reference to which is made at page 8 setting out that

"Should the Buyer default in the punctual payment of any amount falling due in terms hereof then in any of the aforesaid events the Seller shall have the right to claim immediate payment of all amounts then outstanding under this agreement whether or not such amounts are due at that stage, all of which amounts shall immediately become due and payable; provided however that if the Buyer fails to make payment thereof the rights of the Seller under this Clause 15 shall not be exhausted and the Seller shall, notwithstanding the election to claim immediate payment in terms of this sub-clause, be entitled to claim and recover the relief set out in 15.2.2; or in terms of 15.2.2 cancel this agreement whereupon the Buyer shall be obliged at its own risk and expense forthwith to deliver possession of the goods to the Seller and the Seller shall be entitled to recover the difference between ..."

the amounts set out in paragraphs 15.2.2.1 and 15.2.2.2.

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It is to be observed that in terms of paragraph 6 of the opposing affidavit with which the respondent fully associates himself the above averments appearing in the applicant's paragraph 4 of the founding affidavit are admitted. So are the ones appearing in paragraphs 5 and 6 stating that

"The respondent furthermore in terms of Clause 21.2 undertook to pay all legal costs including costs as between attorney and his own client, charges and disbursements incurred by the Seller in enforcing any of the provisions of this agreement."

and

"The respondent in terms of Clause 24 of the agreement chose domicilium citandi et executandi for all notices and processes in terms of the agreement and in pursuance thereof at the address given on page 1 of annexure "B" hereto being the address set out in paragraph 3 hereof."

It is admitted on behalf of the respondent that in pursuance of annexure "B" i.e. the Instalment Sale Master Agreement, the applicant sold and delivered the vehicle to the respondent, and the parties signed annexure "C" which is the first schedule of the Instalment Sale Agreement. The cash price is reflected as R85,000.00. The agreement constituting annexure C was entered into on 7th September 1988. The instalments were to be paid at the rate of R2079.89 per month starting on 5th October 1988. The total number of the instalments is reflected as thirty six. The final instalment is shown as due and payable on 5th September 1991.

In paragraph 8 it is denied on respondent's behalf that he has committed any breach of the contract. The reason advanced is that

"the applicant has caused the respondent to incur financial losses in so far as the vehicle in question is concerned in that right from the onset (sic) the vehicle in question had numerous mechanical problems, which problems the applicant was made well aware of the same per the letter dated the 30th December 1988"

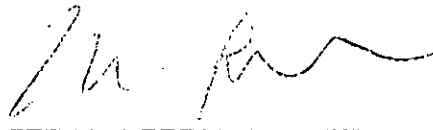
I do not think that the above assertion detracts from the averment that the respondent failed to make payment of the instalments due as prescribed for in the schedule. See Annexure "D".

In Clause 17.1 of annexure "B" it is specifically stipulated that

"the Buyer shall not cede any of its rights or assign any of its obligations or lease any of the Goods hereunder without the prior written consent of the seller."

It thus would appear that Sello Abel Molati has neither lot nor part in these proceedings. The question to be determined is whether the respondent is in arrears. I find that he is. If so then in terms of the agreement the applicant is entitled to judgment.

The rule nisi is confirmed in terms of subparagraphs 2.1 and 2.2 of the Order of Court that was issued on 8th December 1988.



J U D G E .

12th February, 1990.

For Applicant : Mr Steyn
For Respondent : Mr Mphalane.